FOR ARGUMENT

Nos. 77-1583 and 77-1578

Supreme Court, U. S.
FILED
DEC 14 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,

Respondents.

BROADCAST MUSIC, INC., *et al.*,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR ALL-INDUSTRY RADIO MUSIC LICENSE COMMITTEE AS *AMICUS CURIAE*

IRVING MOSKOVITZ
EMANUEL DANNETT
BERNARD BUCHHOLZ
GRAUBARD MOSKOVITZ MCGOLDRICK DANNETT & HOROWITZ
Attorneys for All-Industry Radio Music License Committee
345 Park Avenue
New York, New York
(212) 593-3000

December 11, 1978

TABLE OF CONTENTS

PAGE

The Radio Committee 2

The Government's Antitrust Proceeding Against ASCAP 2

The Government's Antitrust Proceeding Against BMI 3

SESAC Inc. 4

The Interest of the Radio Committee 4

ARGUMENT—

I ASCAP's Blanket License Is a Price-Fixing Agreemen and Is *Per Se* Illegal 6

II There Is No Valid Basis for a Market Necessity Exception 7

III The Court, in Deciding This Case, Should Recognize That the Record Before It Does Not Deal With Local Radio or Its Problems 8

CONCLUSION 9

TABLE OF AUTHORITIES

Cases:

Affiliated Music Enterprises, Inc. v. *SESAC, Inc.* 160 F. Supp. 865 (S.D.N.Y. 1958), *aff'd on other grounds*, 268 F.2d 13 (2d Cir. 1959) 4

Columbia Broadcasting System, Inc. v. *American Society of Composers, Authors and Publishers*, 400 F. Supp. 737 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977) ..... *passim*

PAGE

Northern Pacific Ry. Co. v. *United States*, 356 U.S. 1 (1958) 6

United States v. *ASCAP*, 1940-43 CCH Trade Cas. ¶ 56,104 (S.D.N.Y. 1941) 3

United States v. *ASCAP*, 1950-51 CCH Trade Cas. ¶ 62,595 (S.D.N.Y. 1950) ..... *passim*

United States v. *ASCAP (Application of Shenandoah Valley Broadcasting, Inc.)*, 208 F. Supp. 896 (S.D. N.Y. 1962), *aff'd* 331 F.2d 117 (2d Cir. 1964), *cert. denied*, 377 U.S. 997 (1964) 3

United States v. *ASCAP (Application of National Broadcasting Co., Inc.)*, 1971 CCH Trade Cas. ¶ 73,491 (S.D.N.Y. 1970) 3

United States v. *Broadcast Music, Inc.*, 1940-43 CCH Trade Cas. ¶ 56,096 (E.D. Wisc. 1941) 3-4

United States v. *Broadcast Music, Inc.*, 1966 CCH Trade Cas. ¶ 71,941 (S.D.N.Y. 1966) 4

United States v. *Container Corp. of America*, 393 U.S. 333 (1969) 5

United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) 6

United States v. *Trenton Potteries Co.*, 273 U.S. 392 (1927) 6, 7

Statutes:

15 U.S.C. § 1 5

17 U.S.C. § 504 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,

Respondents.

BROADCAST MUSIC, INC., *et al.*,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR ALL-INDUSTRY RADIO MUSIC LICENSE COMMITTEE AS *AMICUS CURIAE*

All-Industry Radio Music License Committee ("Radio Committee") submits this brief as *amicus curiae* in support of the judgment of the United States Court of Appeals for the Second Circuit rendered on August 8, 1977, to the extent stated in this brief.

The Radio Committee

The Radio Committee represents over 2,000 AM and FM local radio broadcasting stations in connection with the licensing of public performance rights of compositions in the ASCAP and BMI repertories.

Payments by local radio stations to ASCAP and BMI in the year 1977 exceeded $54 million—a sum representing a substantial portion of the total royalties paid to those organizations.

The Radio Committee has been in existence for 20 years. During that period it has negotiated with ASCAP and BMI with respect to licenses for the right of public performance of music in ASCAP's and BMI's repertories. Pursuant to the provisions of a consent decree, as amended ("1950 ASCAP Decree"), in *United States* v. *ASCAP*, 1950-51 CCH Trade Cas. ¶ 62,595 (S.D.N.Y. 1950), the Radio Committee participated in four proceedings on behalf of local radio stations to have the district court determine a reasonable fee for the performance rights of compositions in the ASCAP repertory: *Application of Marion Broadcasting Co.* (1959); *Application of Marion Broadcasting Co.* (1964); *Application of Capital Cities Broadcasting Corp.* (1972); *Application of Berkshire Broadcasting Co., Inc.* (1977).

The Government's Antitrust Proceeding Against ASCAP

In 1941 the Justice Department, challenging ASCAP's policy of requiring all users to take a blanket license and alleging that the practice of obtaining exclusive licenses from its members enabled ASCAP to exact arbitrary prices from licensees, commenced an antitrust action against

ASCAP. A consent decree entered March 4, 1941, required ASCAP to offer broadcasters per program licenses as well as blanket licenses. *United States* v. *ASCAP*, 1940-43 CCH Trade Cas. ¶ 56,104 (S.D.N.Y. 1941).

The 1941 decree was substantially amended by the 1950 ASCAP Decree. Among the changes effected by the amended decree was the inclusion of a provision (¶ IX) under which the court has the power to determine a reasonable fee when the licensee and ASCAP were unable to arrive at a negotiated fee.

The 1950 ASCAP Decree has many infirmities. For example, it has no provision for a license excluding non-network prerecorded programs, or for a license to perform specific ASCAP compositions absent specific consent of the ASCAP members. *See, United States* v. *ASCAP (Application of Shenandoah Valley Broadcasting, Inc.)*, 208 F. Supp. 896 (S.D.N.Y. 1962), *aff'd*, 331 F.2d 117 (2d Cir. 1964), *cert. denied*, 377 U.S. 997 (1964); *United States* v. *ASCAP (Application of National Broadcasting Co., Inc.)*, 1971 CCH Trade Cas. ¶ 73,491 (S.D.N.Y. 1970). Moreover, the decree contains no standards to be applied by the court in determining a reasonable fee. In fact, the court has never set a fee, the fee having always resulted from negotiations between the parties.

It was the failure of the 1950 ASCAP Decree to provide for a per use license that led to the instant litigation.

The Government's Antitrust Proceeding Against BMI

In 1941, at the time of the commencement of the antitrust proceeding against ASCAP, the Government also sued BMI under the Sherman Act, a proceeding which likewise resulted in a consent decree. *United States* v. *Broadcast*

Music, Inc., 1940-43 CCH Trade Cas. ¶ 56,096 (E.D. Wisc. 1941). In 1966 the Government entered into a new consent decree with BMI after an antitrust complaint had been filed in 1964. *United States* v. *Broadcast Music, Inc.*, 1966 CCH Trade Cas. ¶ 71,941 (S.D.N.Y. 1966). That decree likewise required BMI to offer blanket and per program licenses to local radio stations. There is no provision in the BMI decree, similar to that in the 1950 ASCAP Decree, vesting the court with the power to determine "a reasonable fee" for a BMI performing rights license.

SESAC Inc.

Although substantially all the compositions used by local radio stations are derived from the repertories of ASCAP and BMI, a minute percentage comes from SESAC, an organization which issues blanket licenses to local radio stations to perform compositions in its repertory. Although SESAC is not subject to any Government antitrust decree, its activities, according to a dictum contained in an opinion of the district court, are violative of the antitrust laws. *Affiliated Music Enterprises, Inc.* v. *SESAC, Inc.*, 160 F. Supp. 865 (S.D.N.Y. 1958), *aff'd on other grounds*, 268 F.2d 13 (2d Cir. 1959).

The Interest of the Radio Committee

The Second Circuit, in the instant case, declared that the activities of performing rights organizations may be exempt from the strictures of the Sherman Act where a "market necessity" for the existence of a price-fixing organization is shown to exist. Local radio stations, which now are paying millions of dollars for performing rights to ASCAP, BMI and SESAC, may be adversely affected by that principle.

As we posit in Point III, the local radio business is different from the television network business. There is an obvious concern that a decision sustaining the Petitioners' position could be applicable to the local radio's relationship with the Petitioners; particularly as some of the arguments before this Court confuse the two businesses.

Moreover if this Court were to establish a market necessity exception to the *per se* illegality of price fixing activities of performing rights organizations, local radio would be at the mercy of those organizations. Utilizing the drastic penalty provisions of the United States Copyright Law (17 U.S.C. § 504), under which an infringer may be required to pay $100 or more for each infringing use of a copyrighted composition, the organization could make unconscionable demands upon local radio stations which would find themselves defenseless against such demands, except perhaps by boycotting the offending organization. Even such a boycott might be impermissible under the antitrust laws.

Hence, this Court's ruling in the instant case is a matter of vital concern to local radio stations, and it is for that reason that the instant *amicus curiae* brief is being submitted to this Court.

ARGUMENT

I

ASCAP's Blanket License Is a Price-Fixing Agreement and Is *Per Se* Illegal.

We submit that the Second Circuit's decision condemning the ASCAP blanket license as illegal *per se* under Section 1 of the Sherman Act is supported by a plethora of decisions of this Court holding that agreements among competitors to fix prices or otherwise to tamper with the pricing process are illegal *per se* under Section 1 of the Sherman Act. *E.g., United States* v. *Container Corp. of America,* 393 U.S. 333 (1969); *Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1 (1958); *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940); *United States* v. *Trenton Potteries Co.,* 273 U.S. 392 (1927).

It is immaterial to the finding of *per se* illegality that the prices set by the agreement may be reasonable. *United States* v. *Trenton Potteries Co., supra,* at 397-98; *United States* v. *Socony-Vacuum Oil Co., supra,* at 222. Nor is it relevant that the price-fixing agreement may have some alleged economic or social justification. Whatever the reason may be for the price-fixing arrangement, it is illegal *per se* and violative of the Sherman Act. *United States* v. *Socony-Vacuum Oil Co., supra,* at 220.

In short, the rule of reason has no application to price-fixing combinations and cannot justify price-fixing agreements among competitors such as members of ASCAP whose compositions have been found to be substantially interchangeable.

II

There Is No Valid Basis for a Market Necessity Exception.

According to the brief for the United States, as *amicus curiae,* submitted in this case

> "there could be no acceptable 'market necessity' defense to activity that is unlawful *per se.* The reason for having *per se* rules is that it is necessary, at some point, to cut off further inquiry and to lay down clear principles that will govern even if they do not precisely fit some particular cases. It is not possible to entertain a 'market necessity' defense without discarding the idea of cutting off inquiry, that is, without discarding the idea of *per se* rules."

Although we differ with the Government in its conclusion that the ASCAP blanket license is not unlawful *per se,* we completely concur in the Government's rejection of the market necessity exception. We also agree with ASCAP's conclusion (brief pp. 31-37) that there is no valid basis for the market necessity exception.

The activities of ASCAP being *per se* unlawful, there can be no justification for ASCAP's price-fixing activities, whether or not there is a market need for blanket licensing. An exception based on market need would undermine the *per se* rule, requiring a court to embark on investigations which the *per se* rule, by its very nature, was intended to bar.

In short, the principles laid down in *Trenton Potteries* and its progeny make it clear that the pricing combination here involved is illegal *per se,* and the illegal nature of the arrangement is not changed by the fact that the price-

fixing combination may have arisen out of some market need.

III

The Court, in Deciding This Case, Should Recognize That the Record Before It Does Not Deal With Local Radio or Its Problems.

For the reasons above stated, we believe that ASCAP's activities are *per se* illegal and that there is no basis for a market necessity exception. Further, this Court, in reaching its decision in this case, will undoubtedly be cognizant of the fact that the evidence presented to the district court pertains to network television broadcasting and not to local radio stations. It should therefore avoid a decision which would give performing rights organizations a defense to their *per se* violations since the problems confronting local radio stations are substantially different from those of network television.

Were this Court to create a defense to price fixing by the performing rights organizations—whether or not under the guise of a "market necessity" concept—two immediate results would ensue:

First: The Court would perpetuate the present status of performing rights organizations despite the ever changing character of the music and broadcasting businesses. New approaches as well as new competition could therefore be foreclosed.

Second: As in any classical vertical monopoly situation, the possibility of local radio's being compelled to pay exorbitant license fees would be ever-present. As we have already noted, the fees charged by BMI and SESAC are not subject to any restraint. Again, although ASCAP's

activities are limited by the 1950 Decree, were this Court to hold that ASCAP's activities were not *per se* illegal ASCAP might claim that the consent decree should be vacated upon the ground that ASCAP is not violating the antitrust laws, and it should then be free to exact any fees it desires from local radio. These possibilities are exacerbated by the fact that the performing rights organizations may utilize the infringement provisions of the Copyright Law to compel the payment of license fees which are far in excess of the value of its repertory.

Consequently, the Court, in rendering its decision in this case, should recognize that since the record does not relate to local radio there should be no determination that the fees fixed by performing rights organizations with respect to local radio are justified on any basis.

CONCLUSION

Our submission, therefore, is that this Court should find that ASCAP and BMI are illegal price-fixing combinations and should reject any type of market necessity exception.

Respectfully submitted,

IRVING MOSKOVITZ
EMANUEL DANNETT
BERNARD BUCHHOLZ
GRAUBARD MOSKOVITZ MCGOLDRICK DANNETT & HOROWITZ
Attorneys for All-Industry Radio Music License Committee
345 Park Avenue
New York, New York
(212) 593-3000

December 11, 1978.